

CERTIFIED FOR PUBLICATION

**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT
(Shasta)**

THE PEOPLE,	C065806
Plaintiff and Respondent,	(Super. Ct. No. 08F8314)
v.	ORDER MODIFYING OPINION AND
PAUL ELLIS WELLS,	DENYING PETITION FOR
Defendant and Appellant.	REHEARING
	[NO CHANGE IN JUDGMENT]

THE COURT:

It is ordered that the published opinion filed herein on March 28, 2012, be modified as follows:

1. At page 8, delete the second full paragraph of the Discussion and replace it with the following:

The trial court has an affirmative duty to give, sua sponte, correctly phrased instructions on a defendant's theory of defense where ""it appears that the defendant is relying on such a defense, or if there is substantial evidence supportive of such a defense and the defense is not inconsistent with the defendant's theory of the case."" (People v. Maury (2003) 30 Cal.4th 342, 424.) A criminal defendant ""has a constitutional right to have the jury determine every material issue presented by the

evidence, . . . ' [Citation.] An erroneous failure to instruct on an affirmative defense relied upon by the defendant constitutes a denial of this right which 'is in itself a miscarriage of justice'" (*People v. Stewart* (1976) 16 Cal.3d 133, 141.) The duty to instruct on the theory of the defense "include[s] tailoring or correcting an instruction to the particular facts of the case." (*People v. Cole* (1988) 202 Cal.App.3d 1439, 1446.)

2. At the end of the first full paragraph on page 9, delete the following citations: "(*People v. Breverman* (1998) 19 Cal.4th 142, 157; *People v. Stewart, supra*, 16 Cal.3d at p. 140.)"—and replace them with:

(*People v. Maury, supra*, 30 Cal.4th at p. 424; *People v. Stewart, supra*, 16 Cal.3d at p. 140.)

3. At footnote 2 on page 9, delete the sentence, "The Attorney General conceded this point at oral argument." and replace it with:

Without conceding prejudice, the Attorney General agreed with this point at oral argument.

In light of these modifications, which do not change the judgment, the petition for rehearing is denied. (**CERTIFIED FOR PUBLICATION.**)

BY THE COURT:

_____, Acting P. J.

_____, J.

_____, J.